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Supreme Court, U.S.
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Case No. 09-655

IN THE

SUPREME COURT OF THE UNITED STATES

October 2009 Term

STANLEY L. WADE,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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GROUNDS FOR REQUESTING REHEARING

Pursuant to Supreme Court Rule 44(2), a Petition for Rehearing is appropriate if there are "substantial grounds not previously presented." Although Petitioner raised Questions 3 and 6 pertaining to the error of the Court of Appeals in exceeding its jurisdiction by deciding the merits of Petitioner's issues on appeal, and whether the Tenth Circuit should have issued a Certificate of Appealability, Petitioner asserts that this Court was not aware of the fact that the Tenth Circuit routinely violates this Court's clear instructions, as set forth in *Miller-El v Cockrell*, 537 U.S. 322, 327, and 336-337.

Petitioner believes that this Court has an obligation to exert its supervisory powers over the lower courts by clarifying that the routine practice of the Tenth Circuit in examining and deciding issues before having jurisdiction to do so is not to be tolerated.

Note: A copy of Petitioner's Supreme Court Rule 44(2) Compliance is to be found at page 14.

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REASONS FOR GRANTING REHEARING

1. It is the most basic of fundamental rules that a court assure itself of its jurisdiction before proceeding in any matter.

In *Steel Co. v Citizens for Better Env.,* 523 U.S. 83, 93-95, this Court said this concerning jurisdiction:

> "Even if the statutory question is not 'framed in terms of "jurisdiction,"' but simply 'characterized as whether respondent's complaint states a "cause of action,"' 'it is also clear that we have the power to decide the statutory question first [Quoting Justice Stevens' concurrence.] ... This is essentially the position embraced by several Courts of Appeals, which find it proper to proceed immediately to the merits question, at least where the merits question is more readily resolved ... The Ninth Circuit has denominated this practice—which it characterizes as 'assuming' jurisdiction for the purpose of deciding the merits—the 'doctrine of hypothetical jurisdiction.' ...
>
> "We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "*Without jurisdiction the court cannot proceed at all in any*

> *cause.* Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' *Ex parte McCardle,* 7 Wall 506, 19 L Ed 264 (1869).... The *requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' Mansfield, C. & L. M. R. Co. v Swan,* 111 US 379, 382." (Brackets and ellipsis deleted; emphasis added.)

In *Miller-El v Cockrell,* 537 U.S. 322, 336-337, this Court said:

> "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying it denial of a COA based on its adjudication of the actual merits, it is in essence *deciding an appeal without jurisdiction.*" (Emphasis added.)

When a Movant files a § 2255 Motion with the district court, and that court denies the Motion and relief requested, typically the Movant will file a Notice of Appeal and an Application for a Certificate of Appealability in order to comply with 28 U.S.C. § 2253(c). In the Tenth Circuit, a district judge is not

required to grant or deny a COA. Rather, Tenth Circuit Rule 22.1(C) states that "[f]ailure of the district court to issue a certificate of appeal ability within thirty days of filing the notice of appeal shall be deemed a denial." *No other circuit has such a rule*, most opting for the F.R.A.P. 22(b)(1) requirement.

However unsettling it is for a Movant to wait for a COA when he has made a properly supported application to the district court, often waiting beyond the 30 days Tenth Circuit Local Rule 22.1(c) sets, it is vastly more important for this Court to recognize that the Tenth Circuit Rules require an Appellant—even when he or she has not received a COA—to file his opening brief so that the panel may consider it along with the Application for a COA.

The consequence is that the Tenth Circuit typically bases its decision on whether or not to grant a COA when the district court has failed to grant a COA—either by order or by inaction—on far more than a threshold inquiry into the matter, as this Court instructed in *Miller-El*. Such was the case in the instant matter. In fact, the opening brief, if not filed with the Application for a COA, is grounds for dismissal of the Appeal: "[A]ppellant must file an Application for Certificate of Appeal ability ... within 40 days ... Appellant must file an opening brief within 40 days ... Failure to file a brief is grounds for dismissal without further notice," the Tenth Circuit's instructions state.

This rule facilitates a violation of this Court's

instructions in *Miller-El*, that "the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." (*Id.*, 537 U.S. at 327) This, in turn violates the fundamental requirement that "jurisdiction be established as a threshold matter ... [which] is inflexible and without limitation." (*Steel Co.*, 523 U.S. at 95)

Petitioner did not believe it necessary in his Petition for a Writ of Certiorari to underscore the severity of the violation practiced by the Tenth Circuit; hence, this Petition for Rehearing is appropriate under the standard that this is a 'substantial ground not previously presented.' (Supreme Court Rule 44(2))

2. The practice of deciding the issues before granting a COA or after denying a COA is widespread among the judges in the Tenth Circuit.

Before this Court underscored the necessity of limiting a circuit court's inquiry to a threshold inquiry into the underlying merits of the issues an Appellant intends to raise on appeal (*Miller-El*, 537 U.S. at 322), violating this principle might be excused. After all, the courts were still grappling with the AEDPA requirements for some time after April 26, 1996, including changes to 28 U.S.C. § 2253. But, after this Court's decision in *Miller-El*, there really is no excuse for attempting to explore in detail the underlying issues and rendering an opinion as to the merit or lack thereof when deciding whether or not to grant a COA.

Pre-*Miller-El* denials of COAs.

In *English v Cody,* 241 F.3d 1279 (10th Cir. 2001), the court denied a COA. However, it spent several pages examining the record in detail, finding that the grounds raised in English's § 2255 were lacking in merit. It determined that English's claims of ineffective assistant of counsel, his procedural bar to suggestive photo identification claims, his Confrontation Clause claims, faulty eyewitness testimony claims, etc., were groundless. In reaching that conclusion, the court were far beyond a "threshold inquiry into the merits."

In *McCracken v Gibson,* 258 F.3d 970, 984 (10th cir. 2001), the court never did grant a COA, or even mention one until the end of the decision. (*Id.*, at 984) Yet, it considered in great detail the issues McCracken wished to raise on appeal and decided all of them were without merit in a 10-page decision. This was far in excess of what the court had jurisdiction to consider.

These examples illustrate that the Tenth Circuit—at least pre-*Miller-El*—thought nothing of deciding the issues whether or not it had jurisdiction to do so. Yet, the following post-*Miller-El* cases show the unconstitutional practice continues.

In *United States v Springfield,* 337 F.3d 1175, 1177 (10th Cir. 2003), the court denied a COA; however, it stated in its ruling that "[i]n examining

whether the district court's 'resolution was debatable amongst jurists of reason,' courts should not undertake a 'full consideration of the factual or legal bases adduced in support of the claims.' *Miller-El v Cockrell,* 537 U.S. 322, 128 S.C. 1029, 1039 ... Rather, 'the COA determination under § 2253(c) requires an *overview* of the claims and a general assessment of their merits.' *Id.*" (Brackets deleted; emphasis in the original.) Thus, the Tenth Circuit panel admits that it knows what this Court's standard is, as set forth in *Miller-El.*

In *United States v Taylor,* 454 F.3d 1075, 1077 (10th Cir 2006), the court, in bold letters said: "**ORDER DENYING A CERTIFICATE OF APPEALABILITY.**" Then the court went to great lengths to decide the merits of Taylor's claims of ineffective assistance. Taylor had raised several examples of ineffectiveness in his Motion: Failures respecting a violation of the Speedy Trial Act sentencing range, (*Id.*, at 1078), misinformation about sentencing range (*Id.*, at 1079), no challenge to career-offender classification, (*Id.*, at 1080), and failure to challenge the indictment, (*Id., at 1081*). Then after considering in depth these issues, the court said "[w]e DENY a COA and DISMISS his appeal." (*Id.*, at 1082)

These post-*Miller-El* opinions in the Tenth Circuit demonstrate a continuing disregard for this Court's clear instructions in *Miller-El.* If, indeed, the courts of appeals have no jurisdiction to do more than a "threshold inquiry" into the merits of the claims an Appellant wishes to raise in his appeal, it

should never take multiple pages to explain why a COA is denied. The determinative factor in deciding whether or not to issue a COA has been stated over and over again by this Court as being a "substantial showing of the denial of a constitutional right," and whether jurists of reason *could* find the way the district court determined these constitutional issues, or whether jurists of reason *could* find that the issues deserved encouragement to proceed farther. Anything more than that exceeds the jurisdiction of the appellate court.

3. The manner in which the Tenth Circuit handles Applications for a COA further prejudices an Applicant because it encourages, not just an opening, but an abbreviated opening brief, and when it uses that to delve behind a "threshold inquiry," it denies the Applicant the opportunity to fully brief and support his issues.

When a COA is granted, an appellant is normally advised of a briefing schedule. He then has the opportunity and time to research and develop his issues and caselaw in support *for the issues certified.* When the Tenth Circuit insists that the appeal brief—a Pro Se brief for is enclosed—be filed at the same time as the Application for a COA, it provides inadequate time for the appellant to properly prepare his arguments.

In many cases, an appellant spends the bulk of his Pro Se Brief or even one fully "comply[ing] with the Federal Rules of Appellate Procedure and Tenth Circuit Rules," (quote from instruction letter

sent to applicants for a COA), arguing issues which the court of appeals isn't going to consider to begin with. Or, if the court of appeals denies a COA on one or more issues, but grants it for one or more other issues, it denies the appellant the opportunity to argue for an enlargement of the certified issues in the COA.

In Petitioner's case, the Tenth Circuit admitted in its direct appeal decision that appellate counsel made very serious errors, but then concluded that it wouldn't have made any difference in the jury's decision anyway. Now, how in the world could the Tenth Circuit arrive at that conclusion without examining the record in depth? If they did examine the record in depth, they violated this Court's clear instructions in *Miller-El*. If they did not do so (which would have required examining the transcripts in detail), then their conclusion was unsupported, aside from being in excess of their jurisdiction.

Petitioner, as instructed by the Tenth Circuit, did file, along with his Application for a COA, a Pro Se Brief. He did not, nor could he within the limits of that informal opening brief, fully support his claims. After the Tenth Circuit's having seen for itself, from its own decision on direct appeal, that appellate counsel made serious errors, and seeing that a serious constitutional violation was claimed, and seeing—in the Application for a COA—that many jurists of reason would have decided the ground raised in his § 2255 differently, and that he was prejudiced, that ought to have been the end of the consideration as respects whether or not to certify that issue and,

if they had done so, Petitioner could have fully briefed that issue and supported it from the record and transcripts as being prejudicial. Petitioner was denied that right!

The strategy for arguing the grounds as to why a COA should have issued on a particular issue, and the strategy for supporting the issue on appeal, are entirely different. The standards for review are entirely different. The Tenth Circuit's blatant disregard for this Court's clear instructions and the constitutional and statutory rights of Petitioner, and others similarly situated, is a serious breach of the duty the Constitution, Congress, and this Court has placed upon the circuit courts of appeal. This Court is likely unaware of the degree of noncompliance of which the tenth Circuit is guilty, nor of the effect this had on Petitioner's Application for a COA.

Herein, Petitioner has cited but a few examples of *published* opinions and decisions of the Tenth Circuit on Applications for a Certificate of Appealability. There are dozens and dozens more in the Fed-Apps. cases which are not cited by Petitioner. Petitioner knows of no other circuit which disregards the law of this Court, the mandate of Congress in 28 U.S.C. § 2253(c), and the Constitution, as freely as does the Tenth Circuit.

The F.R.A.P. 22(b) says nothing about requiring an opening brief—whether a simplified "Pro Se Brief" or an Appellant Brief in full compliance with F.R.A.P. and Local Court of Appeal Rules—to be filed along with an Application for a Certificate of Appeal-

ability. The Federal Circuit follows the F.R.A.P. 22(b). The D.C. Circuit follows the F.R.A.P. 22. The 1st Circuit follows the F.R.A.P. 22(b), calling it a "Certificate of Probable Cause. The 2nd Circuit largely follows F.R.A.P. 22(b), adding under Local rule 22, that if denied a COA by the district court, the Applicant must apply for a COA with a motion within 21 days following advice from the clerk. The 3rd Circuit's Local Rule 22.0 follows a similar wording as that of the 2nd Circuit, adding in Local Rule 22.2—completely contrary to the Tenth Circuit's Local Rule—that if the district judge has not granted a COA by the time the appeal is docketed, the clerk must "remand[] the case to the district court for a prompt determination as to whether a certificate should issue. The 4th Circuit's Local Rule 22(a)(1)(A) authorizes the filing of an application for a COA. Subsection (B) adds that if no application under (A) is made, then the clerk is to request an initial brief to aid the court in deciding whether a substantial showing of the denial of a constitutional right exists—again, this is *only* where the appellant has not asked the appeals court for a COA. The 5th Circuit follows F.R.A.P. 22. The 6th Circuit largely adopts F.R.A.P. 22, though it adds that if the district court denies a COA, the appellant must promptly request same from the court of appeals. (6th Circuit Local Rule 22(a)) the 7th Circuit follows F.R.A.P. 22, as does the 8th Circuit. The 9th Circuit follows F.R.A.P. , adding that the request for a COA "must be first considered by the district court" and that the appeals

court "will not act on a motion for a COA if the district court has not ruled first." (9th Circuit Local Rule 22-1(a)) The 11th Circuit generally follows F.R.A.P. 22, though it requires the district court to grant or deny first.

The Tenth Circuit appears to stand alone in its provisions that; (1) the failure of the district court to grant or deny is to be construed—without notice to the appellant—as a denial of a COA; and (2) that the Application for a Certificate of Appealability must be accompanied by a "Pro Se Brief," a simplistic, generic opening brief, or an opening brief fully compliant with the F.R.A.P. and Tenth Circuit Local Rules—no other circuit requires this or presumes denial if the district judge fails to grant or deny. These unique deviations from the F.R.A.P. and this Court's instructions affect the fundamental rights of appellants, including Petitioner.

4. The clear and indisputable violations of the mandates of Congress, the Constitution, and this Court, call for this Court to exercise its supervisory powers.

In *Young v U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809, this Court said this: "The exercise of supervisory authority is *especially appropriate* in the determination of the procedures to be employed by courts *to enforce their orders, a subject that directly concerns the functioning of the judiciary.*" (Emphasis added.)

Noteworthy is the fact that the Tenth Circuit's own supervisory power, as explained in *United States v Hasting*, 461 U.S. 499, 505 (1983), is not implicated. The Court explained that: "*Guided by considerations of justice,*...and in the exercise of supervisory powers, federal courts may, *within limits*, formulate procedural rules not specifically required by the Constitution of the Congress.... [These are appropriate] to *preserve judicial integrity* by ensuring that a conviction rests on appropriate considerations validly before the jury." Instead, the procedures employed by the Tenth Circuit validated something which was not "validly before the jury." It lent its imprimatur on an erroneous decision based upon the clear and admitted (by the Tenth Circuit) of ineffective assistance of appellate counsel. This had nothing to do with "considerations of justice." (Emphasis added.)

CONCLUSION

The grounds Petitioner set forth in his Application for a COA were well supported, both as to making a substantial showing of the denial of a constitutional right and as to demonstrating that jurists of reason would have and had found the district court's decisions in denying Petitioner the relief requested in his § 2255 debatable. It was only by manipulating and misapplying this Court's clear instructions in *Miller-El*, the Constitution and 28 U.S.C. § 2253(c) that he was denied a COA. The Court is urged to exercise its supervisory authority "to enforce [its] orders, a subject that directly concerns the judiciary." (*Young*, 481 U.S. at 809)

WHEREFORE, Petitioner respectfully prays that the Court rehear his Petition for Certiorari and remand the case back to the Tenth Circuit with instructions to conform its Local Rules to F.R.A.P. 22, this Court's decision in *Miller-El*, and for such other and further relief as the Court may deem just and equitable, certifying the issues presented for appellate review in a COA.

By executing this Petition for Rehearing, Petitioner declares that the statements herein are true under penalty of perjury pursuant to 28 U.S.C. § 1746.

Executed this _____ day of February, 2010.

/S/ Stanly L.Wade
Petitioner, Pro Se

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CERTIFICATE OF COMPLIANCE

This is to certify that this Petition is restricted to the grounds specified in Supreme Court Rule 44(2), and that it is presented in good faith and not for delay.

Dated February ____, 2010.

Stanley L. Wade

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